

-POSTING DRAFT-**Chapter 90: Products Containing Perfluoroalkyl and Polyfluoroalkyl Substances**

SUMMARY: This Chapter details the notification requirements and sales prohibitions for new products and product components containing intentionally added Perfluoroalkyl and Polyfluoroalkyl Substances (PFAS) pursuant to 38 M.R.S. §1614.

- 1. Applicability.** This Chapter applies to all new products and product components sold, offered for sale, or distributed for sale in the State of Maine which contain intentionally added perfluoroalkyl and polyfluoroalkyl substances.
- 2. Definitions.**
 - A. Alternative.** “Alternative” means a substance or chemical that, when used in place of PFAS, results in a functionally equivalent product and that, when compared to a PFAS that it could replace, would reduce the potential for harm to human health or the environment, or has not been shown to pose the same or greater potential for harm to human health or the environment as that PFAS. Alternatives include reformulated versions of products, including versions reformulated by removal or addition of one or more chemicals or substances, that result in the reduction or removal of intentionally added PFAS from the product. Alternatives also include changes to the manufacturing process that result in the reduction or removal of PFAS from a product.
 - B. Brand name.** “Brand name” means a name, symbol, word, or mark that identifies a product, and attributes the product to the owner of the brand.
 - C. Carpet or rug.** “Carpet or rug” means any consumer product made from natural or synthetic fabric marketed or intended to be used as a floor covering inside commercial, industrial, or residential buildings. This includes carpeted door mats intended for indoor use.
 - D. Commercially available analytical method.** “Commercially available analytical method” means any test methodology used by a laboratory that performs analyses or tests for third parties to determine the concentration of PFAS in a product. Commercially available analytical methods do not need to be performed at a third-party laboratory; however, the method must remain unmodified when not performed by a third-party laboratory. Commercially available analytical methods include methods approved by the U.S. Environmental Protection Agency (EPA) when used in accordance with that approval.

NOTE: Information about EPA approved methods is available at <https://www.epa.gov/measurements-modeling/collection-methods>.

 - E. Consumer.** “Consumer” means any person who purchases goods or services which are sold by manufacturers, wholesalers, or retailers.
 - F. Currently unavoidable use.** “Currently unavoidable use” means a use of PFAS that the Department has determined by rulemaking to be essential for health, safety or the functioning of society and for which alternatives are not reasonably available.

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- G. Department.** “Department” means the Department of Environmental Protection composed of the Board of Environmental Protection and the Commissioner of the Department of Environmental Protection.
- H. Distribute for sale.** “Distribute for sale” means to ship or otherwise transport a product with the intent or understanding that it will be sold or offered for sale by a receiving party subsequent to its delivery.
- I. Essential for Health, Safety, or the Functioning of Society.** “Essential for Health, Safety or the Functioning of Society” means products or product components that if unavailable would result in a significant increase in negative healthcare outcomes, an inability to mitigate significant risks to human health or the environment, or significantly interrupt the daily functions on which society relies. Products or product components that are Essential for Health, Safety or the Functioning of Society include those that are required by federal or state laws and regulations. Essential for the Functioning of Society includes but is not limited to climate mitigation, critical infrastructure, delivery of medicine, lifesaving equipment, public transport, and construction.
- J. Fabric.** “Fabric” means a textile made by weaving, knitting, or felting natural or synthetic fibers. For the purposes of this rule, fabric includes leather and synthetic leather.
- K. Fabric treatment.** “Fabric treatment” means a consumer product intended to be applied to fabric to give or enhance one or more characteristics, including but not limited to stain resistance or water resistance. Fabric treatments do not include fabric dyes.
- L. Fully fluorinated carbon atom.** “Fully fluorinated carbon atom” means a carbon atom on which all the hydrogen substituents have been replaced by fluorine.
- M. Intentionally added PFAS.** “Intentionally added PFAS” means PFAS added to a product or one of its product components in order to provide a specific characteristic, appearance, or quality or to perform a specific function. Intentionally added PFAS also includes any degradation byproducts of PFAS serving a functional purpose or technical effect within the product or its components. Products containing intentionally added PFAS include products that consist solely of PFAS. Intentionally added PFAS does not include PFAS that is present in the final product as a contaminant.
- N. Manufacturer.** “Manufacturer” means the person that manufactures a product or whose brand name is legally affixed to the product. In the case of a product that is imported into the United States where the person that manufactured or assembled the product or whose brand name is affixed to the product does not have a presence in the United States, manufacturer includes either the importer or the first domestic distributor of the product, whichever is first to sell, offer for sale, or distribute for sale the product in the State of Maine.

NOTE: Certain online retail platforms may allow for purchase of products directly from a producer. When no other person meets the definition of manufacturer under this Chapter, and the product is sold, offered for sale, or distributed for sale in the State of Maine, the Department will consider the importer to be the manufacturer.

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NOTE: When it is possible to consider both entities the manufacturer, the Department will consider the party who controls the formulation of the product and its PFAS content to be the manufacturer.

- O. Offer for sale.** “Offer for sale” means to make a product available for purchase, including through online sales platforms that deliver into the State of Maine.
- P. Perfluoroalkyl and polyfluoroalkyl substances (PFAS).** “Perfluoroalkyl and polyfluoroalkyl substances” or “PFAS” means substances that include any member of the class of fluorinated organic chemicals containing at least one fully fluorinated carbon atom.

NOTE: The EPA maintains a webpage of chemicals that have been identified as PFAS (available at: <https://comptox.epa.gov/dashboard/chemical-lists/pfasmaster>) which provides clarity on what is considered a PFAS. Any product sold, offered for sale, or distributed for sale in the State of Maine which contains intentionally added PFAS must be reported to the Department regardless of whether the substance is found on any list.

NOTE: 38 M.R.S. § 1614 requires notification of intentionally added PFAS by CAS number, therefore chemicals which do not have CAS numbers assigned are not subject to this Chapter. However, chemicals that do have CAS number assigned but are withheld by other persons or are otherwise unavailable are subject to this Chapter.

- Q. Person.** “Person” means any individual; partnership; corporation; firm; federal, state, or local government entity; or public or private organization of any character.
- R. Product.** “Product” means an item manufactured, assembled, packaged, or otherwise prepared for sale to consumers, including its product components, that is sold or distributed for personal, residential, commercial, or industrial use, including for use in making other products. Product includes packages, packaging components, and food packaging as defined in 32 M.R.S. § 1732, when sold individually or in bulk and not used in marketing, handling, or protecting a product.
- S. Product component.** “Product component” means an identifiable part of a product, regardless of whether the manufacturer of the product is the manufacturer of the product component.
- T. Publicly available.** “Publicly available” means information that is lawfully made available to the general public from federal, state, or local government records, widely distributed media, or disclosures made to the general public that are required by federal, state, or local law.
- U. Reasonably available.** “Reasonably available” means a PFAS alternative which is readily available in sufficient quantity and at a comparable cost to the PFAS it is intended to replace and performs as well as or better than PFAS in a specific application of PFAS in a product or product component.
- V. Significant change.** “Significant change” means a change in the composition of a product which results in the addition of a specific PFAS; a change in the amount of PFAS of more than a 10% increase, above the method variability allowed by the commercially available analytical method

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used, of the concentration that has been reported when compared to the existing notification; or a change in responsible official or contact information.

W. Substantially equivalent information. “Substantially equivalent information” means information that the Department can reasonably identify as conveying the same information required in Section 3(A). Substantially equivalent information must all be in a single document or location. Substantially equivalent information may include an existing notification by a person who manufactures a product or product component when the same product or product component is offered for sale under multiple brands.

X. Used. “Used” means the condition of a product having been installed, operated, or utilized for its intended purpose by at least one owner or operator. Used does not apply to a product that has been returned to a retailer or that is otherwise offered for resale without the product having been installed, operated, or utilized.

3. Notification.

A. Beginning January 1, 2023, a manufacturer of a product for sale in the State that contains intentionally added PFAS shall submit to the Department a notification. This section does not apply to used products.

(1) A notification under this section must include:

(a) A brief description of the product, including at minimum;

(i) Global Product Classification (GPC) brick category and code, if available;

(I) If GPC is not applicable to the product or product component, the United States International Trade Commission’s Harmonized Tariff System (HTS) or

(II) Unless an alternative category is approved under Subsection C below, if neither GPC code nor HTS number is applicable, products or product components must be registered individually by name and with sufficient information, such as stock keeping unit (SKU), to differentiate them from similar items or items with different compositions.

(ii) The general type of the product; and

(iii) Its intended use.

(b) The purpose for which PFAS are used in the product, including PFAS in any product component;

(c) The amount of each of the PFAS as a concentration, identified by name and its chemical abstracts service (CAS) registry number, of each PFAS in the product or any product component reported as an exact quantity determined using commercially available analytical methods, or as falling within a range approved by the Department; and

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- (i) If reporting PFAS as falling within a Department-approved range, found in the Department's online notification system, the manufacturer may rely on calculations specific to the inputs and outputs of their manufacturing process or that of a product component's manufacturer to determine the amount of PFAS present.

For product components for which the Department has previously received notifications, which are used in more complex products containing the reported components, the manufacturer of the more complex product shall either report PFAS in the product including its components, or refer to the notifications for product components and any PFAS in the remainder of the product.

- (d) The name and address of the reporting manufacturer, and the name, address, email address, and phone number of a responsible official for the manufacturer. The responsible official provided must have the authority to execute or direct others to execute the steps in Section 8 below.

NOTE: Claims of confidential business information may be made at the time of notification. The Department will handle such claims in accordance with Maine's Freedom of Access Act Title 1, Chapter 13, subchapter 1, M.R.S. and related policies and procedures; in particular 1 M.R.S. § 402(3)(B) excludes information from public disclosure that the courts would find to be privileged.

For notifications submitted to the Department under the statutory requirement and prior to the effective date of this rule and/or the availability of the digital reporting system, the notification must be submitted into the digital database within 90 days of the effective date of this rule.

- (2) Waiver of Notification. The Department may waive all or part of the notification requirement under Subsection 1 if the Department determines that substantially equivalent information is publicly available, except that the Department will not issue a waiver for the information required in Subsection 1(d) above.

- (a) The Department will evaluate issuing a waiver to the notification requirement if the manufacturer submits a request containing the following:
 - (i) A description of the product(s) for which a waiver is requested;
 - (ii) A list of which requirements of Subsection 1 the manufacturer seeks a waiver for;
 - (iii) A description of any publicly available records which contain information substantially equivalent to the information required in Subsection 1, above;
 - (iv) A statement that information in Subsection 2(a)(iii) above is updated in a similar manner as required by Subsection D below and;
 - (v) A link to or copy of all publicly available substantially equivalent information described by the manufacturer.

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- (b) The manufacturer shall still complete the notification for any requirements that were not waived, include directions to where the publicly available substantially equivalent information can be found, and pay the fee established in Section 6.
- B.** The information required in Subsection A above must be submitted in a form approved by the Department. Electronic submission of complete information to the Department's online notification system satisfies this requirement.

NOTE: The Department's online notification system is available at <HTTPS://> .

- C.** Reporting multiple products or product components together under a single GPC code or HTS number under subsection A above is allowed, so long as;
 - (1) All products to be so reported fall within the same GPC brick code or HTS number,
 - (2) The same PFAS are present in every product, and
 - (3) Each PFAS is present in every product, either:
 - (a) In a substantially similar amount as determined by a commercially available analytical method, or
 - (b) If reporting by range of concentration is available, within the same concentration range.

If neither a GPC code nor HTS number is applicable to the products or product components a manufacturer may, as part of their notification, propose a category for reporting multiple products or product components; however, if either are applicable then reporting as a category must be done using the GPC code or HTS number.

The Department will review the proposed category to determine its reasonableness and either approve or deny the proposed category. During the Department's review the manufacturer will be considered to be in compliance with the requirements of Section 3 provided they have submitted all required information.

- D.** A manufacturer shall update the information in the notification whenever there is a significant change in the reported information or when requested to do so by the Department.
 - (1) In the event of a significant change or request by the Department, a manufacturer shall update their notification:
 - (a) Within 60 days of a request by the Department;
 - (b) Within 30 days of any change in responsible official or contact information; or
 - (c) Prior to the start of sales of a product with a new formulation or when there is a significant change in the amount or type of PFAS present in the product. The update must include the date after which the prior formulation will not be sold, offered for sale, or distributed for sale in the State of Maine.

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- (2) A manufacturer may voluntarily update the notification whenever a PFAS is reduced or eliminated, or to inactive status whenever a product is modified such that it no longer contains any intentionally added PFAS.
 - E. If a product is imported directly into the State of Maine from outside the United States to be sold, offered for sale, or distributed for sale outside of the sales and distribution channels controlled by the manufacturer, and the manufacturer has not submitted notification of the product to the Department, it is the responsibility of the person importing the product into the State of Maine to submit notification of the product to the Department, as required by Subsection A.
 - F. A notification is not effective until the Department has received payment of the fee required by Section 6.
 - G. A manufacturer shall provide, upon request by the Department, evidence sufficient to demonstrate the accuracy of information reported in Subsection A.
- 4. Exemptions.**
- A. The following are exempt from the requirements of this Chapter:
 - (1) A product for which federal law or regulation controls the presence of PFAS in the product in a manner that preempts state authority. For this purpose, the provisions of this Chapter are severable, and if any phrase, Section or Subsection is preempted by federal law or regulation, the validity of the remainder of this Chapter shall not be affected.

NOTE: Federal preemption involves a determination that the intent of federal laws is to limit or eliminate overlapping programs at the state level; the intent can be expressly written into the enabling statute or implicit where the structure and scope of the federal law reflects the intent to preempt.

The Department will treat as exempt products where an applicable federal law is written with language that explicitly preempts parts of this program. The Department will also treat as exempt any products where an applicable opinion from a court having jurisdiction in Maine finds that preemption of parts of this program is implied.

In the absence of explicit statutory language or an applicable court finding, the Department does not have the authority to independently make a finding of law or accept an assertion that implied preemption exists.

For more information on preemption see:

<https://crsreports.congress.gov/product/pdf/R/R45825/2>

- (2) A product subject to Title 32, § 26-A, *Reduction of Toxics in Packaging*, and
- (3) A product subject to Title 32, § 26-B, *Toxic Chemicals in Food Packaging*.

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NOTE: The statutory exemption of products subject to Title 32, § 26-A, *Reduction of Toxics in Packaging*, and Title 32, § 26-B, *Toxic Chemicals in Food Packaging*, applies to all packing, packing components and food packaging as defined in as defined in 32 M.R.S. § 1732, regardless of whether the Department has specifically regulated such items.

These exemptions apply only when items are actually used as packaging, packing components, or food packing, intended for marketing, handling, or protection of products.

5. Prohibition on Sale of Products Containing Intentionally Added PFAS.

- A. Effective January 1, 2023, a person may not sell, offer for sale, or distribute for sale in the State of Maine a carpet or rug that contains intentionally added PFAS. This prohibition does not apply to the sale or resale of a used carpet or rug.
- B. Effective January 1, 2023, a person may not sell, offer for sale, or distribute for sale in the State of Maine a fabric treatment that contains intentionally added PFAS. This prohibition does not apply to the sale or resale of a used fabric treatment or used product to which fabric treatment has been applied.
- C. Effective January 1, 2030, a person may not sell, offer for sale, or distribute for sale in the State of Maine any product that contains intentionally added PFAS. This prohibition does not apply to the sale or resale of a used product.

6. Fees.

- A. **Fee amount.** To cover the administrative costs incurred by the Department to administer the program, a manufacturer of products or product components required by Section 3 to provide notice shall, as part of submission of notification, pay a fee of \$250 covering up to the first three notifications submitted under Section 3(A)(1) and an additional \$50 for each additional notification thereafter.

For the purposes of calculating fees, each submission of all the information required in Section 3(A)(1), which has not been waived, for either an individual product or product component or a group thereof reported as a single category will be considered a separate notification.

NOTE: Notifications are required only for products or product components offered for sale or distributed for sale in the State Maine. Product components that are incorporated into a complex product which are offered or distributed for sale in Maine are not subject to the notification requirement, even when information regarding the product components is provided as part of that product's notification submission.

A separate notification and fee are only required for product components when they are offered or distributed in Maine without being incorporated into a more complex product.

- (1) A fee is only required for new notifications of products. No fee is required for notification updates or changes to inactive status.

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For notifications submitted to the Department under the statutory requirement and prior to the effective date of this rule and/or the availability of the digital reporting system, the fee must be paid within 90 of days of the effective date of this rule.

- B. If paying electronically via the Department's reporting database, a receipt confirming digital payment will be issued.
- C. Fees will be considered paid either when funds are transferred to the Treasurer or when a confirmation of electronic payment is transmitted.

7. Failure to Provide Notice.

- A. Unless granted an extension in accordance with 38 M.R.S. §1614(3) or a waiver in accordance with section 3(A)(2) above, a person may not sell, offer for sale, or distribute for sale in the State of Maine a product containing intentionally added PFAS if the manufacturer has failed to provide the information required under Section 3.
 - (1) The prohibition in this Section does not apply to a retailer in the State of Maine unless the retailer sells, offers for sale, or distributes for sale in the State a product for which the retailer has received a notification pursuant to Section 8(A)(2) that the sale of the product is prohibited.
 - (2) The Department may exempt a product from the prohibition under this subsection if the Department has determined that the use of PFAS in the product is a currently unavoidable use.

NOTE: Violations of this Chapter are subject to the Department's enforcement authority under 38. M.R.S. §§ 347-A - 349. The Department's initial focus will be on encouraging voluntary compliance. If a person resists efforts to achieve voluntary compliance the Department may take progressive steps to achieve compliance.

8. Certificate of Compliance.

- A. If the Department has reason to believe that a product contains intentionally added PFAS and is being sold, offered for sale, or distributed for sale in violation of Section 7, the Department may direct the manufacturer of the product to, within 30 days:
 - (1) Provide the Department with certification, on forms provided by the Department, attesting that the product does not contain intentionally added PFAS; or
 - (2) Notify persons who sell, offer for sale, or distribute for sale that product in Maine that the sale of that product is prohibited in Maine, and provide the Department with a list of the names and addresses of those notified.

AUTHORITY: 38 M.R.S. § 1614

EFFECTIVE DATE: